

# NOTE

## THE USE OF MACKINNON'S DOMINANCE FEMINISM TO EVALUATE AND EFFECTUATE THE ADVANCEMENT OF WOMEN LAWYERS AS LEADERS WITHIN LARGE LAW FIRMS

### I. INTRODUCTION

Feminist legal theory offers several approaches to understanding the problems and challenges confronting women attorneys seeking advancement in today's large law firms. However, the critical question is whether it also provides a strategy for progress. This author argues that it does.

Catharine A. MacKinnon's brand of dominance feminism not only provides a theoretical framework for investigating the glass ceiling(s) at many large law firms, where women continue to be vastly underrepresented at the partnership level,<sup>1</sup> but also posits a paradigm for reform based on the unique experiences and realities of women lawyers' lives. Although MacKinnon has never addressed this issue directly, her anti-subordination (or dominance) theory has special relevance for women attorneys seeking to achieve partnership status at most large firms. According to MacKinnon's model, the partnership selection process within these organizations produces a hierarchy of inequality because it tends to credit male knowledge as normative, while treating the female experience as inconsequential.<sup>2</sup> Thus, any attempt to reform the current power structure within law firms requires a better understanding of the lives of women lawyers and their continual struggle with gender inequality.<sup>3</sup> For these women, dominance feminism serves as a call to action; it seeks to empower them as women, and not as women in relation to men.

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1. Most lawyers in private law firms consider partnership to be the pinnacle of their legal careers. Partners are considered leaders in their practice areas and in the firm generally. Interview with Rory Judd Albert, Partner and Executive Comm. Member, Proskauer Rose LLP, in N.Y., N.Y. (Oct. 9, 2006).

2. See CATHARINE A. MACKINNON, *From Practice to Theory, or What Is a White Woman Anyway?*, in *WOMEN'S LIVES, MEN'S LAWS* 22, 24 (2005) [hereinafter *WOMEN'S LIVES*] (stating that to recognize the subordination and marginalization of women as something done to women by men, whether affirmatively or implicitly, is to recognize that in practice there exists a hierarchy of inequalities).

3. See *id.* at 23 (emphasizing the role of women's experiences of sex inequality in shaping sex discrimination laws).

## II. THE UNDERREPRESENTATION OF WOMEN IN MANAGERIAL POSITIONS AT LARGE LAW FIRMS: STRUCTURAL INROADS AND THE DENIAL OF INEQUALITY

Women remain severely underrepresented in positions of the greatest power, influence, and financial remuneration throughout most for-profit organizations in America.<sup>4</sup> However, nowhere is this disparity more prevalent than in large U.S. law firms, where women account for only five percent of all managing partners, and male associates are nearly two to three times more likely than their female counterparts to attain partnership.<sup>5</sup> The inner workings of these complex institutions offer critical insight into a variety of issues of particular importance to women, such as work-family conflict, the gender division of labor, and sex-based bias in the workplace.<sup>6</sup> In evaluating the significant challenges faced by female attorneys seeking advancement in major law firms, feminism not only serves as a diagnostic tool, but also as a mechanism for generating possible solutions.

While it is important to recognize that no panacea exists for eliminating the barriers faced by women attorneys, MacKinnon's dominance perspective encompasses the greatest potential for explaining the underrepresentation of women at the managerial level, and contemplating pragmatic strategies to confront the inherent structural and social biases found in many large firms. Unlike other feminist models, MacKinnon's theory offers such institutions an opportunity both to recognize the dominance of male-worker norms inherent in the established criteria for promotion and to rectify the resulting structural impediments that this presents to the advancement of women.

### A. "*The 'No-Problem' Problem*"<sup>7</sup>: *Gender Inequality Is a Problem*

Objectivity . . . is a denial of the existence or potency of sex inequality that tacitly participates in constructing reality from the dominant point

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4. See Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1733 (1991) (indicating that the U.S. work force remains intensely segregated and stratified along gender lines, and that "[f]ull-time female employees earn less than two-thirds of the annual wages of male workers"); see also DEBORAH L. RHODE, ABA COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 5 (2000) [hereinafter UNFINISHED AGENDA], available at <http://womenlaw.stanford.edu/aba.unfinished.agenda.pdf> (noting this phenomenon in the legal profession generally).

5. UNFINISHED AGENDA, *supra* note 4, at 23.

6. See Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 295 (1995).

7. Rhode, *supra* note 4.

of view.<sup>8</sup>

A central element behind the inability of women lawyers to achieve and maintain partnership status is the failure of any real consensus as to whether or not a problem even exists.<sup>9</sup> Denials of a “woman problem” (or gender inequality) within large law firms assume several forms, and act as a major impediment to progress.<sup>10</sup> It is widely assumed that, over the past several decades, the barriers to women’s advancement in the profession have eroded substantially and that gender equality is no longer a question of how or if, but only when.<sup>11</sup> Yet, a wide array of research confirms that women’s prospects for advancement in large law firms are curtailed by a number of continuing formal and informal practices, including gender stereotyping, inflexible workplace policies, and inadequate access to informal support networks controlled by men.<sup>12</sup> Although many male members of management readily point to the increasing presence of women at the associate level,<sup>13</sup> these statistics

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8. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 181, 181 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

9. See UNFINISHED AGENDA, *supra* note 4, at 5; see also Joan Williams, *Market Work and Family Work in the 21st Century*, 44 *VILL. L. REV.* 305, 315-16 (1999). Williams argues that “[o]ne of the social and cultural norms that sustain and reproduce domesticity,” or the organization of market work around the male worker, is “the convention of denying its existence. . . . [W]e, as a society, often gloss over the persistence of inequality with reassurances that ‘most women now work.’” *Id.* (citation omitted).

10. Failures to recognize sex-based inequality in the profession assume three forms: (i) denying significant gender inequalities; (ii) acknowledging gender disparities, but failing to appreciate their injustice; and (iii) conceding that sex-based injustices exist, but disclaiming any responsibility for causing or remedying them. See Rhode, *supra* note 4, at 1735.

11. There is a widespread assumption, particularly among male attorneys, that female lawyers are not limited in their opportunities for professional advancement. For evidence of this trend see UNFINISHED AGENDA, *supra* note 4, at 5 (citing a 2000 ABA Journal poll finding that “only about a quarter of female lawyers and three percent of male lawyers believe[] that prospects for advancement were greater for men than for women”); Epstein et al., *supra* note 6, at 356-57; Paula A. Patton, *Women Lawyers, Their Status, Influence, and Retention in the Legal Profession*, 11 *WM. & MARY J. WOMEN & L.* 173, 190 (2005) (discussing a 1998 NALP survey indicating that forty-two percent of women, but only seventeen percent of male attorneys, “believe that there is not a ‘level playing field’ for women and men in their pursuit of partnership”) (citations omitted); Deborah L. Rhode, *Gender and Professional Roles*, 63 *FORDHAM L. REV.* 39, 59 (1994) [hereinafter Rhode, *Gender*] (quoting one male attorney as stating: “[i]f there is [any substantial gender bias], then in a few years it will be gone when the new generation takes over. So relax, and let time take care of the problem”); Deborah L. Rhode, *Myths of Meritocracy*, 65 *FORDHAM L. REV.* 585, 585-86 (1996) [hereinafter Rhode, *Myths of Meritocracy*] (noting surveys from 1991 finding that “only one-quarter to one-third of men [reported] observing gender bias in the profession, although two-thirds to three-quarters of women [indicated] that they personally have experienced it”).

12. For a more thorough discussion of the current occupational barriers facing women attorneys in law firms, as well as in the profession, see generally UNFINISHED AGENDA, *supra* note 4.

13. See sources cited *supra* note 11 and accompanying text.

hardly constitute evidence of their having attained equal access to partnership.<sup>14</sup> While studies indicate that women have made much progress since gaining entry into large firms, it is simply inaccurate to suggest that it is just a matter of time before they reach parity at the partnership level.<sup>15</sup> Any framework designed to confront—and rectify—the constraints placed upon female attorneys seeking partnership must account for the ambivalence and false consciousness surrounding their exclusion from these positions.

According to “difference” feminists, the primary justification for sex-based inequality in the employment context is biological difference.<sup>16</sup> Difference, or cultural, feminists, such as Carrie Menkel-Meadow, suggest that women practice law differently from men because of their varied moral development and reasoning.<sup>17</sup> Difference feminists advocate embracing women’s distinct attributes as grounds for their inclusion in the legal profession.<sup>18</sup> These feminists claim that while the law represents the male ethic of justice, women are more likely to reason from a care perspective, which emphasizes relational values and is less adversarial.<sup>19</sup> However, focusing on purported differences between male and female attorneys may serve only to reinforce existing stereotypes that obscure intra-firm, gender-based hierarchies as “natural” or “necessary.” Because it conceives of gender inequality as a question of

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14. By 1992, women constituted 37% of all associates at the top 250 law firms, but accounted for only 11.2% of their partners. See Epstein et al., *supra* note 6, at 314. A recent New York Times article commented on the number of female associates versus partners: “Although the nation’s law schools for years have been graduating classes that are almost evenly split between men and women, and although firms are absorbing new associates in numbers that largely reflect that balance, something unusual happens to most women after they begin to climb into the upper tiers of law firms.” Timothy L. O’Brien, *Up the Down Staircase: Why Do So Few Women Reach the Top of Big Law Firms?*, N.Y. TIMES, Mar. 19, 2006, § 3, at 1 (citing to a 2005 report showing that “only about 17[%] of the partners at major law firms nationwide were women”).

15. See Epstein et al., *supra* note 6, at 356-59.

16. See Rhode, *supra* note 4, at 1739-40 (juxtaposing the two primary responses to the issue of gender inequality in the legal profession between those feminists who deny the extent or nature of sex-based difference and those who embrace women’s differences). For an overview of the origins of “different voice” feminism, see CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* 1-2 (1982), explaining that sex-based differences are inherently responsible for women’s different moral reasoning and choices.

17. Menkel-Meadow has argued that women will transform the legal profession based on their varied moral development and reasoning, and has contended that women may be less confrontational and more likely to adopt mediational approaches to dispute resolution, and may be more sensitive to clients’ needs and interests. See Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 639 (1994); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL’Y & L. 75, 86-87 (1994) [hereinafter Menkel-Meadow, *Portia Redux*].

18. See *supra* text accompanying note 16.

19. See, e.g., Menkel-Meadow, *Portia Redux*, *supra* note 17, at 76.

the distribution of power, rather than mere differences between the sexes, dominance feminism purports to extend beyond perceived male/female dichotomies and to identify the underlying prejudices at the core of this endemic differentiation.<sup>20</sup> This approach recognizes that sex-based distinctions are, at least implicitly, involved in partnership determinations and that this long-standing practice has, through the years, been sanctioned as a mere result of difference or happenstance. Until this disparity is rectified, *de facto* segregation and marginalization will continue to persist in the upper echelons of our legal world. Examining the ways in which partnership—and other management—decisions are influenced by gender will lead to a better understanding as to how disparities among male and female attorneys in large firms are propagated, legitimized, and discounted in formulating policy.

*B. Historical Context and Structural Obstacles:  
The Shift in Emphasis from Client Service to Client Production  
(A Story of Dominance and Ensuing Hierarchy)*

While the partnership process is unique to each firm, there are certain generalities among major law firms that are best explained by the modern transformation of the business of law.<sup>21</sup> Today's elite law firms are the product of a transition that occurred in the decade between the mid-1980s to mid-1990s, when substantial business generation and client development came to replace client service as one of the major determinants of partnership potential.<sup>22</sup> While female attorneys were disadvantaged under the traditional system of operation, the reconfiguration of the promotion and compensation structure at many large firms to place heavier emphasis on business production, or "rainmaking," spawned additional roadblocks to their advancement.<sup>23</sup> Female lawyers, who were in many instances not privy to the same business or social networks as male colleagues, suffered disproportionately under this new regime.<sup>24</sup> The resulting hierarchy and

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20. See CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 40-42 (1987) [hereinafter FEMINISM UNMODIFIED].

21. See Steve French, *Of Problems, Pitfalls and Possibilities: A Comprehensive Look at Female Attorneys and Law Firm Partnership*, 21 WOMEN'S RTS. L. REP. 189, 193 (2000).

22. Prior to the mid-1980s, law firms served a coterie of clients whose loyalty was largely unquestioned. The majority of firms at the time followed a "lock-step" compensation system in which income was linked to tenure. Firm infrastructure was premised on associates contributing their labor as a base capital investment and on senior partners utilizing that labor in serving the firm's clients. See Patton, *supra* note 11, at 176-77.

23. See *id.* at 177-78.

24. See UNFINISHED AGENDA, *supra* note 4, at 16-17, for a cogent analysis of women's

intra-firm competition continued to shape women's experiences at large firms.

For example, in response to this shift, a number of firms instituted levels of partnership with unequal status and earnings (for example, equity versus contract, or income, partnership) based on judgments of individual attorneys' business production abilities.<sup>25</sup> In these institutions, women cannot obtain full-partnership without satisfying the requisite amount of generated business as measured by—and against—the firm's most successful male business producers. Viewing the exclusion of women from partnership through this prism is integral to understanding the inherent structural bias of most large firm.

### III. THE FAILURE OF EQUALITY IN LARGE LAW FIRMS: A CRITIQUE OF POWER AND THE HARM(S) OF SUBORDINATION ON THE BASIS OF SEX

Giving women 'equal' opportunity to live up to standards designed around men does not offer women true equality. Rather, it is a way of perpetuating discrimination against women and calling it equality.<sup>26</sup>

Women now constitute about half of ABA-accredited law school graduating classes, but account for only approximately seventeen percent of partners in law firms nationwide.<sup>27</sup> The underrepresentation of women of color is even greater, as they account only for about three percent of the profession overall and have the lowest law firm retention rate of any group.<sup>28</sup>

Minorities as a whole constitute only three percent of all partners in our largest firms.<sup>29</sup> These disparities are self-perpetuating in that few

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inadequate access to networks of mentoring, contacts, and client development.

25. See Epstein et al., *supra* note 6, at 315-16; Patton, *supra* note 11, at 179-80. Note that this practice of distinguishing between equity and non-equity partners is not as common in New York as in other U.S. cities, such as Chicago. See Epstein et al., *supra*, at 316.

26. Williams, *supra* note 9, at 318.

27. Patton, *supra* note 11, at 173. For a summary of other relevant statistics on partnership promotion at large firms, see French, *supra* note 21, at 192-93. "Women only comprised 19[%] of all associates promoted at the twenty-five largest New York firms in 1997-98, while men comprised 81[%]." *Id.* Of the women working at the nation's top twenty largest law firms, 21% were promoted in 1992, 24% in 1997, and 20% in 1998; of all the lawyers who have entered the profession in the past thirty years, "18[%] of the women had become partners as opposed to 45[%] of the men." *Id.*

28. See UNFINISHED AGENDA, *supra* note 4, at 14.

29. Menkel-Meadow, *supra* note 17, at 627; Rhode, *Myths of Meritocracy*, *supra* note 11, at 587-88. They also cannot serve as much needed mentors for their juniors, who can endeavor to emulate their achievements. See Jill Schachner Chanen, *Early Exits*, A.B.A. J., Aug. 2006, at 32, 36 (quoting minority women attorneys in large firms as to the dearth of available mentors with similar backgrounds and experiences). Indeed, studies reflect a greater desire on behalf of women of color in large firms for mentoring opportunities. See *id.* (pointing to one study of associates in large firms finding that 67.3% of the women of color surveyed would have liked more and better mentoring,

women—and even fewer minorities—are elected to leadership positions on executive or management committees of large law firms and, thus, are unable to counteract subjective biases ingrained in firm decision-making processes.<sup>30</sup> The paucity of women in the partnership ranks is further compounded by high levels of female associate attrition. A recent study reveals that female associates are three to seven percent more likely to leave their firms prior to partnership consideration than their male counterparts.<sup>31</sup> A subsequent survey reports that these women were nearly two times more likely to depart from their firms because of “parenting or elder care responsibilities.”<sup>32</sup> These findings may explain why almost half of all female associates (forty-seven percent) express a lack of interest in attaining partnership status.<sup>33</sup>

By emphasizing women’s accounts of their own experiences at large firms, the feminist method serves both to confront and contradict traditional justifications for the disproportionately low number of females promoted to partnership and current notions of objectivity in partnership standards and decision making. Through a process somewhat akin to “consciousness-raising,”<sup>34</sup> numerous studies have documented women’s experiences practicing law and revealed their daily struggle to fulfill their considerable personal and professional demands.<sup>35</sup> These reports confirm that women’s opportunities for advancement in large firms are most limited by conventional gender stereotypes, inadequate access to mentors, and inflexible workplace policies and practices, as well as other structural biases predisposed toward reinforcing male

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compared with 52.3% of men of color, 54.6% of white women and 31.8% of white men).

30. Patton, *supra* note 11, at 179 (explaining that in the few instances where women are elected to sit on executive committees, they often fill “women’s slots”).

31. NALP FOUND., KEEPING THE KEEPERS: STRATEGIES FOR ASSOCIATE RETENTION IN TIMES OF ATTRITION 11 (1998). A subsequent study conducted in 2003 found that more than half of women associates had left their firms within five years of starting. NALP FOUND., KEEPING THE KEEPERS II, MOBILITY AND MANAGEMENT OF ASSOCIATES 22-23 (2003) [hereinafter KEEPING THE KEEPERS II].

32. KEEPING THE KEEPERS II, *supra* note 31, at 63.

33. *Id.*

34. See generally Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 863-67 (1990) (defining consciousness-raising as the process by which women draw insights and perceptions from their own experiences and from those of other women in order to challenge dominant versions of social reality); Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL’Y 1, 6 (1994) [hereinafter Bartlett, *Gender Law*] (discussing MacKinnon’s emphasis on consciousness-raising as a method for ascertaining women’s own objective truths and exposing conventional understandings of objectivity as the male point of view). For a particularly interesting analysis of consciousness-raising as a feminist method, see Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-discrimination Law*, 75 DENV. U. L. REV. 1321, 1325-26.

35. See generally UNFINISHED AGENDA, *supra* note 4; Epstein et al., *supra* note 6; Patton, *supra* note 11.

dominance over females.<sup>36</sup> They also acknowledge that these problems are particularly acute for female minority attorneys who labor under additional disadvantages such as race, ethnicity, or sexual orientation.<sup>37</sup>

The status quo at most large law firms reflects an acceptance of both sameness and difference theories with respect to issues of gender inequality.<sup>38</sup> As advocated by sameness feminists, law firms grant women and men equal access to partnership.<sup>39</sup> However, the fact that these institutions have done so, on the condition that those women conform to a male standard of success, is beyond the gender neutral “lens” of the formal equality model. Difference feminists have argued that women bring a unique perspective to the practice of law and that law firms should make every effort to inculcate and foster these special social, biological, and cultural values that women espouse.<sup>40</sup> Yet, a number of these “differences” are engendered by the fact that women lawyers are held solely to male expectations and are often used to construe their underrepresentation in the profession as a byproduct of natural inclination or unfettered personal choice.

By adopting a comparative framework for intra-firm reform, both sameness and difference approaches frustrate the goal of improving the ability of female lawyers to advance on their own merits. MacKinnon criticizes the treatment of sex equality as a question of assimilation or integration on the basis of male norms.<sup>41</sup> Rather, she contends that politics is responsible for the exclusion of women from male positions of

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36. See UNFINISHED AGENDA, *supra* note 4, at 14.

37. See Rhode, *Myths of Meritocracy*, *supra* note 11, at 590.

38. See Leslie Bender, *Sex Discrimination or Gender Inequality?*, 57 FORDHAM L. REV. 941, 950-51 (1989) (arguing that “both [approaches] accept the implicit male norm of existing legal institutions and attempt to mold women to its expectations and demands”).

39. See generally Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175 (1982) (advocating that women be treated the same as men and that rules and policies should be absolutely neutral with regard to gender).

40. See Isabel Marcus et al., *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 36-49 (1985). According to Gilligan, societal structures have long been dominated by the male form of “justice reasoning.” She contends that these institutions would benefit from the inclusion of both male and female voices in public discourse, but that women must first be given an equal opportunity to express their “different voice.” Under Gilligan’s difference paradigm, a law firm might institute policies that foster a more cooperative working environment or increase the extent to which mediation is encouraged as an alternative to litigation. These policies would seek to integrate and assimilate women’s biological differences by encouraging both male and female attorneys to utilize their “care reasoning” abilities. Rather than reconstructing law firms based on sexual equality, these policies would seek to reform a firm’s management structure by highlighting and inculcating the importance of women’s “special” knowledge, skill, and expertise in its daily practice. See *id.* See generally GILLIGAN, *supra* note 16.

41. See MACKINNON, *supra* note 20, at 34 (suggesting that questions of “gender difference” are really issues of power, specifically of male supremacy and female subordination).

privilege and entitlement.<sup>42</sup> Accordingly, gender discrepancies at the partnership level are indicative of problems of power and not gender difference or sameness. Specifically, they are due to the perceived supremacy of male worker norms and the concomitant subordination of women.

*A. The “Real Rules” of Female Lawyers’ Everyday Lives: The Role of Gender Stereotyping in Articulating Opportunities for Advancement*

In addition to sharing the conditions . . . of sexual assault and economics and marriage and the definition of all women set by those circumstances, women lawyers have found ourselves excluded from inner circles and then rejected because we don’t know the inside story or don’t play by the real rules of the game, the rules in the tacit curriculum.<sup>43</sup>

MacKinnon argues that the “real rules” of women’s everyday lives effectively prescribe that which society permits as appropriate in a woman.<sup>44</sup> These rules are not based on women’s talents or life experiences, but are contrived according to patterns of socialization, popular culture, and common notions of masculinity and femininity.<sup>45</sup> They epitomize the white upper-class male perspective and, for the most part, are incongruous with women’s everyday lives.<sup>46</sup> Similarly, the institutional rules by which one achieves partnership at major law firms govern the lives of female associates seeking advancement but fail to account for their personal realities or struggles with inequality. These rules were “designed for persons like the named partners themselves [and not women].”<sup>47</sup> Under their guise, female associates are required not only to adjust their lifestyle to meet unreasonable professional demands, but also to adapt their individual attributes in order to fit the male definition of success. As a consequence, women lawyers seeking partnership are at an automatic disadvantage simply because of their status as women.

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42. *See id.* at 37-44. “In the dominance approach, sex discrimination stops being a question of morality and starts being a question of politics.” *Id.* at 44.

43. CATHARINE A. MACKINNON, *On Exceptionality: Women as Women in Law*, in FEMINISM UNMODIFIED, *supra* note 20, at 70, 76 (1987).

44. *See* CATHARINE A. MACKINNON, *Law in the Everyday Life of Women*, in WOMEN’S LIVES, *supra* note 2, at 34 (positing that society and, thus, the law, recognizes and reflects reality only as conceived of from the male point of view, forcing “the deepest rules of women’s lives . . . beneath or between the lines, and on other pages”).

45. *See id.*

46. *See id.* at 33.

47. Bender, *supra* note 38, at 941-42.

Characteristics traditionally associated with women are devalued in large law firms and are seen as incompatible with male standards of professional achievement.<sup>48</sup> Female attorneys are not met with the same presumption of competence enjoyed by their male colleagues,<sup>49</sup> and are often identified as lacking prized traits, including assertiveness, competitiveness, business savvy, and entrepreneurialism.<sup>50</sup> Mannerisms more frequently demonstrated by males than females, such as pugnacity and combativeness, are considered conducive to the competitive and adversarial relationships among lawyers.<sup>51</sup> Women lawyers also face a “double bind” of being perceived as—or criticized—as either too timid or too strident, or overly assertive or not sufficiently aggressive.<sup>52</sup> These stereotypes are especially influential in firms with the smallest percentage of women in leadership positions.<sup>53</sup> Partnership decisions, which are largely individualized in nature, are typically made by an executive—or other management—committee on which women are severely underrepresented. These decisions are easily swayed by gender typecasting.<sup>54</sup> The result of these intrinsic gender biases is that sex-based subordination in large firms appears natural or necessary, rather than artificially crafted upon inaccurate and misleading sex-based assumptions.

Many female attorneys, especially those who are primary caregivers, are systematically excluded from the partnership track because of externally imposed and internalized gender role stereotyping.<sup>55</sup> Preconceived notions about women’s care-giving role and “lesser commitment often distort performance evaluations and eventually become self fulfilling prophecies.”<sup>56</sup> Those who aspire to

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48. See UNFINISHED AGENDA, *supra* note 4, at 15.

49. See *id.* at 6. In large national surveys, between half and three-quarters of women report that they are subjected to a higher standard than men. See *id.*

50. See *id.* When asked to identify what firms value most in attorneys, women lawyers in private practice consistently reported that firms favor uniquely male attributes and qualities. These values can be broken down into five categories: (i) the ability to make money, (ii) exclusive commitment to workplace, (iii) achievement through competition and adversity, (iv) rationality and non-emotionality, and (v) power. Patton, *supra* note 11, at 180-83.

51. See *id.*; Epstein et al., *supra* note 6, at 368-69 (explaining that men are frequently regarded as combative and assertive, while women are viewed as disadvantaged in that they may be unable, or unlikely, to command a room).

52. UNFINISHED AGENDA, *supra* note 4, at 15 (noting that when women depart from traditional stereotypes they tend to be subjected to additional scrutiny and rated lower).

53. See *id.* at 15.

54. See *id.* at 15-16; see also French, *supra* note 21, at 193-94 (commenting on the subjective and individualized nature of the partnership selection process, which makes it particularly prone to stereotyping).

55. See Bender, *supra* note 38, at 943.

56. Rhode, *Myths of Meritocracy*, *supra* note 11, at 588.

partnership are obliged to demonstrate “single-minded devotion” to the firm and willingness to sacrifice virtually any family life.<sup>57</sup> The dominance of the “family-free model” in defining partnership expectations exacts, perhaps, the most detrimental form of gender stereotyping upon both working mothers and unmarried single women.<sup>58</sup> Women who seek a reduced work schedule and other accommodations for family needs are seen as insufficiently committed, while those without a family or child-rearing responsibilities are viewed as having no legitimate justification for refusing additional work or failing to conform to an ideal partner norm.<sup>59</sup> This presents women attorneys with a “catch-22” that perpetuates stereotypical perceptions concerning male and female, breadwinner and housewife roles: If they are mothers, they belong in the home or require “special treatment” from their employers and colleagues; if not, then they have no valid excuse for not working full-time and, if need be, overtime.<sup>60</sup>

The everyday reality of the lives of many female attorneys simply does not reflect actual underlying discrepancies between the sexes in terms of their lawyering abilities. Rather, these constraints mirror the system of gender hierarchy within large law firms, which is heavily influenced by stereotypes and fostered largely by the devaluation of women’s experiences of inequality. Women attorneys face a variety of demeaning practices that convey a severe lack of respect for their intelligence and professionalism, such as being referred to as “little lady,” “sweetie,” “sweetheart,” or “doll,” and being mistaken for clientele or clerical staff.<sup>61</sup> However, instead of penalizing those individuals responsible for such inappropriate conduct, individuals who complain of such behavior and sexual harassment generally are discredited and labeled as “bounty hunters.”<sup>62</sup> Stereotypical perceptions

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57. Patton, *supra* note 11, at 181-82.

58. *See id.* (describing the family-free model as expecting the “utmost commitment to the workplace and willing sacrifice of any family” or personal life); Mary Anne Case, *How High the Apple Pie?: A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1759 (2001) (arguing that men with wives and children benefit the most from this pattern of stereotyping—against both working mothers and women without families—because they get the increased subsidies without the harm of the discrimination).

59. *See UNFINISHED AGENDA*, *supra* note 4, at 6-7; Williams, *supra* note 9, at 311-13 (explaining that market work is organized around an ideal worker who works full-time and overtime, and takes little to no time off for family obligations, and that this norm is predicated on men belonging in the market because they are aggressive and competitive, and women belonging in the home because of their focus on caregiving).

60. *See* Williams, *supra* note 9, at 313-14.

61. *See* Rhode, *Gender*, *supra* note 11, at 65-66.

62. *See id.* at 66. *See infra* Part V (discussing sexual harassment claims of women lawyers generally and noting that many victims never come forward because of the possibility of retaliation,

about women's lesser ability and dedication are also reflected in gender-linked disparities in pay and assignment allocation among lawyers of comparable positions and qualifications.<sup>63</sup> For example, women with children consistently report receiving less challenging and desirable work.<sup>64</sup> While these and other incidents of gender bias might appear relatively trivial or even isolated from the male perspective, their cumulative effect on female attorneys may have devastating personal and social consequences.<sup>65</sup>

While some feminists refer to stereotyping as distorted distinctions on the basis of gender, MacKinnon rejects the notion that sexism is predicated upon real differences.<sup>66</sup> She suggests that the practice of distinguishing between women, on the one hand, and success, on the other, transcends misconceptions about women's capabilities.<sup>67</sup> MacKinnon's theory is applicable to women lawyers in that they are often restricted from partnership when they fail to comport with societal, male-dominated, constructions of their female identity. The prize of partnership is made less attainable to women not on the basis of any personal transgression, but by virtue of its being defined as requiring attributes associated with being male, and as antithetical to those qualities that women are commonly perceived as embodying. Presumptions of women's lesser commitment and competence

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humiliation, and the difficulty of establishing proof).

63. See N.Y. STATE BAR ASS'N COMM. ON WOMEN & THE LAW, GENDER EQUITY IN THE LEGAL PROFESSION: A SURVEY, OBSERVATIONS, AND RECOMMENDATIONS 16 (2001). Gender disparities in income are especially pronounced at the highest salary levels and among those in private practice: 71% of males in private practice, but only 48% of females, earned \$100,000 or more in the year 2000. *Id.* When corrected for region, the data reveals the greatest pay disparities in urban areas, where the majority of large law firms are located. In New York City, 76% of males, but only 53% of females, earned \$100,000 or more, while in other urban areas, 49% of males, but only 28% of females, earned \$100,000 or more. *Id.* For those in private practice, there were also significant disparities in hourly billing rates: The average hourly billing rate for women—\$206.80—was about 16% lower than the average rate for men—\$238.93. See *id.*; see also Rhode, *Myths of Meritocracy*, *supra* note 11, at 587.

64. See Patton, *supra* note 11, at 184 (attributing disparities in assignment allocation to stereotypical assumptions concerning women's lesser commitment); Rhode, *Myths of Meritocracy*, *supra* note 11, at 588 (recalling one female attorney's account that "since I came back from maternity leave, I get the work of a paralegal . . . I want to say, 'look I had a baby, not a lobotomy!'") (citation omitted).

65. See Rhode, *Myths of Meritocracy*, *supra* note 11, at 589-90 (commenting on the ambivalence of male attorneys regarding incidents of gender bias with law firms); see *supra* note 11 and accompanying text.

66. See CATHARINE A. MACKINNON, *Women, Self-possession, and Sport*, in FEMINISM UNMODIFIED, *supra* note 20, at 117, 117-18 (rejecting the difference approach to resolving problems of gender inequality, and observing that women's so-called differences are often used to perpetuate irrational, or arbitrary, distinctions and sexist stereotypes).

67. See *id.* at 118-19 (discussing, in the context of women's athletics, how notions of success are tied to pursuits and activities at which women's success is considered untenable).

perpetuate the myth that women lawyers are less likely to be successful partners than their male counterparts. The problem with the partnership standards that prevail among large law firms, therefore, is not that they exclude women from aspiring to achieve, but that many women who are capable of becoming partners are nonetheless excluded simply because they are women.

*B. The Bottom Line: Why “Difference” Does Not Really Make a Difference in Becoming a Rainmaker or Meeting Billable Hour Requirements*

The difference approach misses the fact that the hierarchy of power produces real as well as fantasied differences, differences that are also inequalities.<sup>68</sup>

The underrepresentation of women at the partnership level is largely attributable to promotion criteria based on entrenched masculine norms, rather than actual or perceived biological or cultural differences between female and male lawyers. As discussed above, the historical shift in firm structure, and subsequent increased intra-firm competition, strengthened the tendency of firms to use a male-dominated paradigm in framing partnership expectations.<sup>69</sup> In the wake of this transition, large firms increasingly demand that associates bill more hours per year,<sup>70</sup> and emphasize “rainmaking,” or an associate’s ability to attract and retain clients.<sup>71</sup> While those currently in power will undoubtedly attest to the egalitarian nature of such benchmarks, they are by their very nature unavoidably antithetical to women lawyers seeking advancement. While both women and men express dissatisfaction regarding the intense workloads that have become common to virtually all large law firms, recent surveys indicate that men work more billable hours on average and that women suffer disproportionately because they also bear the greatest burden for family obligations.<sup>72</sup>

Excessive billable hour requirements and client development

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68. MACKINNON, *supra* note 20, at 37.

69. See French, *supra* note 21, at 194 (giving examples of the effects of increased intra-firm competition, such as a “demand on associates to bill more hours per year, a greater associate-to-partner ratio, a longer partnership track,” and greater emphasis on an associate’s “rainmaking” ability). See generally *supra* Part II.B. (describing the change in focus from client service to client production).

70. At the time of Epstein’s 1995 study the lowest standard for billable hours was reportedly 1800 to 2000 hours, while the highest ranged from 2100 to over 3000. Epstein et al., *supra* note 6, at 382.

71. See *id.* at 331-35.

72. See *id.* at 302.

expectations are symptomatic of a broader refusal by these institutions to accept the following two fundamental premises: family obligations and childbearing, as well as other domestic responsibilities, inevitably affect women more than men;<sup>73</sup> and male lawyers are better able to perform as ideal workers because they are supported by a flow of family work provided by their wives.<sup>74</sup> In most American households, women continue to perform the majority of non-market work, and this impacts their employment in various and complicated ways.<sup>75</sup> For example, one study reports that almost half (forty-eight percent) of all married male attorneys have wives who do not work outside the home, while an overwhelming ninety-three percent of married female lawyers have spouses who also work full-time.<sup>76</sup> Time devoted to child care cannot be fused with, and inevitably detracts from, work time and, thus, women lawyers on average report lower billable hours.<sup>77</sup> Female associates report experiencing high levels of anxiety in juggling their work load and personal commitments.<sup>78</sup> Time pressures are frequently cited as a major impediment to women's business development abilities.<sup>79</sup> Recent studies also indicate that some female junior partners and associates feel they do not receive the mentoring or assignments necessary to position them well on the promotion track.<sup>80</sup> A lack of available mentors—particularly female mentors<sup>81</sup>—and inadequate access to formal and

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73. See French, *supra* note 21, at 197-98.

74. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 65-66 (2000) [hereinafter WILLIAMS, UNBENDING GENDER].

75. See generally Michael Selmi, *Care, Work, and the Road to Equality: A Commentary on Fineman and Williams*, 76 CHI.-KENT L. REV. 1557 (2001) (analyzing existing barriers to workplace equality based on labor force patterns that allow men to shift the majority of home work to women, and rejecting other scholarly approaches that call for women to act more like men or for care work to be more highly valued).

76. See French, *supra* note 21, at 198; see also WILLIAMS, UNBENDING GENDER, *supra* note 74, at 71-72.

77. See Epstein et al., *supra* note 6, at 379 (noting, interestingly, that men may bill hours more generously than women, who tend to under-report time actually spent working).

78. See UNFINISHED AGENDA, *supra* note 4, at 17 (referencing one study in which half of all women lawyers surveyed reported high levels of stress in meeting private and professional demands).

79. See Epstein et al., *supra* note 6, at 334-35. While men are able to devote more time to clients and frequently take them out for breakfasts, lunches, and dinners, women often find themselves confined by external obligations and are typically able only to lunch with clients. See *id.*

80. See *id.* at 343.

81. While a significant number of female junior partners and associates agree that being mentored by another woman is preferable, they also report a lack of available female mentors. The major explanation given by women partners for this was time constraints and heavy workloads. See *id.* at 351-54. Other reasons offered for why women fail to mentor other women include: they are too busy with demands of work and family; they are discouraged from entering into a mentoring relationship by the pressure of the billing structure; or they hold grudges for the fact that no one mentored them. See Patton, *supra* note 11, at 188.

informal business contacts place women at a severe disadvantage in rainmaking and may also leave them out of the loop on career development.

While a difference feminist might suggest that the standards for partnership are predisposed toward men because women are less skilled at generating business or less capable of expending human capital in the form of billable hours,<sup>82</sup> this only provides a limited understanding of why male norms continue to be among the most prevalent partnership criteria. Rearranging surface features to incorporate so-called “female values”<sup>83</sup> into large firm practice has had little, if any, effect on the deleterious attitudes that perpetuate this hierarchy, and is unable to remedy the pervasiveness of male dominance. The current “lawyer-owned client paradigm,”<sup>84</sup> because it reserves the right of client ownership to senior male partners, unduly restricts the ability of women to cultivate their own networks that would otherwise allow them to become rainmakers.<sup>85</sup> Research indicates that senior male partners are ambivalent about initiating relationships with younger female lawyers at the risk of appearing sexually improper, and typically prefer to mentor males.<sup>86</sup> This behavior shields women lawyers from meaningful client exposure and sustains inequality by retaining business-generating power in the hands of a few males. By failing to provide adequate time or rewards for mentoring female associates, and in refusing to support reduced or flexible work schedules, law firms have given women reason to believe that they are alone in their quest for partnership and have enhanced the stereotype that women are somehow less deserving of partnership than their equally-qualified male colleagues.

### C. *Deconstructing Myths of “Choice”: The Use of Work-Family*

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82. See UNFINISHED AGENDA, *supra* note 4, at 30; see also Menkel-Meadow, *Portia Redux*, *supra* note 17 (exploring how gender differences affect the ways in which lawyers perform their tasks based on women’s “different voice,” or “ethic of care,” and, specifically noting that women lawyers, because of their concern with gender and quality of life issues, may cause the profession to reevaluate the demand of its “greedy institutions” that require so much devotion to work).

83. For instance, Menkel-Meadow suggests that the differences between female and male lawyers, particularly “women’s lawyering,” should be celebrated and incorporated into the everyday practice of law. See *supra* note 17 and accompanying text; see also Marcus et al., *supra* note 40, at 55-57.

84. Patton, *supra* note 11, at 178.

85. See French, *supra* note 21, at 199 (“[The] [i]nadequacy of mentoring, and its effects on female associates and rainmaking, has been noted by many, including one ‘white shoe law firm’ partner who described the practice of retiring male partners typically passing their clients down to their male protégés.”).

86. See Epstein et al., *supra* note 6, at 355-56 (noting that male partners are reluctant to eat alone or travel with female associates because of how it may appear, and that this detracts from otherwise fertile opportunities to develop closer mentoring bonds).

*Conflict as a Justification for Depriving Women of  
Partnership Opportunities*

Although the number of entry-level women hires at most firms has reached parity with that of men, these women fail to remain with their firms long enough to achieve partnership.<sup>87</sup> One common—but largely misguided—justification for this disparity is that many women opt out of professional life because of personal reasons that are not necessarily related to firm practices.<sup>88</sup> While this might be true in certain instances, describing the departure from large firm life of most female attorneys as voluntary only serves to reinforce existing stereotypes concerning female lawyers' lack of loyalty, commitment, and partnership potential. Requiring women to command the social and business power of men in order to obtain partnership essentially deprives them of any option other than assimilation.<sup>89</sup> While women attorneys can, and often do, perform ideally as associates, their "choices" are, nonetheless, restricted by having to adjust to a male-dominated ideal. Utilizing "choice" rhetoric in this regard is inconsistent with claims that women have an equal opportunity to achieve partnership. Its application is especially prevalent and disconcerting in the case of mothers, where the accepted understanding is that mothers do not drop off the partnership track due to inflexible firm policies, but because of unfettered personal choice.<sup>90</sup>

Family-related practices currently in place at large firms are widely criticized as inadequate to permit both female and male attorneys to fulfill important family obligations.<sup>91</sup> Law firm policies involving

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87. See Patton, *supra* note 11, at 173.

88. See Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 26, 2003, (Magazine), at 42. *But see* Rhode, *Myths of Meritocracy*, *supra* note 11, at 591-93 (observing that female attorneys' sacrifices are not "simply a function of 'natural' preferences," but are also the result of limited family-related policies).

89. See Williams, *supra* note 9, at 317 ("An analysis of domesticity as a gender system allows us to see that women's 'choices' take place in a context that requires ideal workers to command the social power available to men . . . . A system that requires workers to command the social power of men in order to get 'good jobs' discriminates against women . . . [and] is inconsistent with our ideals of gender equality."); see also WILLIAMS, UNBENDING GENDER, *supra* note 74 at 5-6 (explaining that choice language is often used to describe women's economic marginalization as a matter of personal "choice," but allowing women the "choice" to perform without the privileges that support male workers is not gender equality).

90. See Williams, *supra* note 9, at 316. For an illustration of the relation between formal firm policy and informal practice see, for example, Belkin, *supra* note 88, at 42, 45-56 (recounting the story of Katherine Brokaw, a new mother who was also lead associate at her law firm and aspired toward becoming a partner, but eventually was compelled to forgo those ambitions after her requests for part-time work were turned down).

91. See, e.g., UNFINISHED AGENDA, *supra* note 4, at 7. *But see* Epstein et al., *supra* note 6, at 403 (hypothesizing that the real problem is not inadequate part-time and flex-time arrangements, but rather the "perceptions of clients regarding part-time attorneys . . . ; the impact on colleagues; the

parental or maternity leave, part-time work, and child care are frequently cited as failing to accommodate a balanced lifestyle and are often blamed for women's "forced abdication" of critical career aspirations.<sup>92</sup> Indeed, a 2001 American Bar Association study concluded that two-thirds of the lawyers surveyed—female and male alike—reported experiencing work-family conflict, and most agreed that it is the greatest roadblock to women's advancement.<sup>93</sup> Instead of providing women with real options in terms of flexible scheduling, the majority of firms only offer so-called "mommy track" policies,<sup>94</sup> which allow attorneys to scale back hours at the cost of permanent marginalization from partnership.<sup>95</sup>

Gender hierarchies within law firms will persist as long as concerns about quality of family life remain peripheral to professional priorities.<sup>96</sup> In failing to confront dominant conceptions that classify family obligations as incompatible with partnership, firms are perpetuating an unfair and deleterious message to both female associates and future generations of lawyers.<sup>97</sup> Young women entering the profession are not secure in the expectation that they can sustain both a career and family.<sup>98</sup> Instead of challenging the male-dominated vision of success directly, many of these women are acquiescing at the outset of their careers to the strictures of the hierarchical arrangement which is now ingrained in

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quality and quantity of work assigned to part-time associates; the stigma within the firm that may be associated with being a part-time lawyer; and the requirement to remove oneself from the partnership track"); see also Patton, *supra* note 11, at 189-90 (exploring why so few attorneys (4.1%) avail themselves of policies permitting part-time work, such as the possibility that they may be stigmatized or denied advancement opportunities as a result).

92. See Rhode, *Gender*, *supra* note 11, at 63.

93. See UNFINISHED AGENDA, *supra* note 4, at 6.

94. "Mommy track" policies may allow female attorneys to scale back hours, but this may ultimately have a deleterious effect on their chances of making partner. See Judith S. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 *FORDHAM L. REV.* 111, 124 (1988) (speculating that critical questions confronting female attorneys at large law firms no longer concern how to get onto the "mommy track," but rather how to get off it, how to make it an acceptable mainstream practice, and how to ameliorate its opportunity costs to the individual); Bender, *supra* note 38, at 943-44 (positing that firms may use the decisions of women to engage in alternative work arrangements as a justification for imposing "glass ceiling barriers to promotion, firm power, salary and prestige").

95. Williams, *supra* note 9, at 335-36.

96. See Rhode, *Gender*, *supra* note 11, at 64 (asserting that female attorneys will continue to leave their firms so long as their needs are ignored and their talents devalued).

97. See Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, *N.Y. TIMES*, Sept. 20, 2005, at A1 (stating that sixty percent of the young college women interviewed contemplating a career in the law were keenly aware of the difficulties of having both a career and family, and asserted that they plan to "cut back on work or stop work entirely" once they have children).

98. Whereas previous generations of women expected to have high-powered careers and then eventually scale back their professional plans after having children, young women today automatically assume that their careers will have to take a back seat to child-rearing. See *id.*

many of the profession's most prominent institutions.<sup>99</sup>

#### IV. A MODEL FOR CHANGE: ELIMINATING THE POWER OF ONE OVER ANOTHER

How can [power] be changed if it is authoritatively defined in male terms and retained in male hands? I am tired of people who have power—whether they identify with it or not—telling women that we can only have power if we transform it. They might begin by insisting it be transformed in the hands of those who already have it.<sup>100</sup>

The foregoing analysis demonstrates the failure of both equality and difference approaches to remedy the hierarchical disposition and gender stratification of major law firms. The problem with the underrepresentation of women at the partnership level is not simply that women practice law differently than men, but that the normative framework underlying this disparity continues to go unchallenged. The male-dominated structure within these law firms remains entrenched due to the failure of any conceptual and practical theory to critically examine the correlation between the ideal partner and masculine identity. While feminists are eager to criticize gender-based work requirements, many fail to connect these standards to the reluctance of male employers to see the nature of the job any differently than they always have.<sup>101</sup> Sameness and difference strategies, which neither attack dominant male norms nor account for male sources of privilege, are thus largely unable to explain adequately the underrepresentation of women in managerial roles.<sup>102</sup> Dominance feminism, on the other hand, is engaged in the practice of identifying and challenging the realities of male superiority and patterns of socialization which lead to the oppression of women.<sup>103</sup> For any real

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99. *See id.* (“[F]ew students seem to be able to imagine a life for themselves that isn’t constructed along traditional gender roles.”).

100. CATHARINE A. MACKINNON, *Law in the Everyday Life of Women*, in *WOMEN’S LIVES*, *supra* note 2, at 32, 42.

101. *See* Kathryn Abrams, *Cross-Dressing in the Master’s Clothes*, 109 *YALE L.J.* 745, 755 (2000) (reviewing JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000)) (praising Williams’s discussion of an ideal-worker norm based on characteristically male patterns of employment and access to a flow of household services provided by women, but criticizing her naiveté in overlooking the influence and proclivity of employers and even courts toward understanding this norm as arising from the nature of the work itself and not from the masculine identities of those performing it).

102. *See id.* at 758-59 (commenting that Williams fails to either alter the dominant norms of most workplaces or challenge fully the sources of privilege within the status quo in formulating antidiscrimination initiatives).

103. *See* MACKINNON, *From Practice to Theory, or What Is a White Woman Anyway?*, *supra* note 2, at 23.

change to ensue, the legal community must acknowledge the historic existence of an intimate relationship between being a lawyer and being male.<sup>104</sup>

Feminists, such as Leslie Bender and Kathryn Abrams, have utilized the dominance model to expose and explain persistent gender inequities in the context of large law firms and similar professional settings. Bender has described the system of sex segregation that pervades large law firms, under which the power of male norms over female attorneys is assumed to be natural or intrinsic, as a paradigm constructed by men to reward and reinforce gendered male attributes.<sup>105</sup> She argues that requiring women lawyers to play by men's rules, but not affording them equal respect, power, and prestige, does not constitute gender equality.<sup>106</sup> According to Bender, "our goal must be to reconstruct legal institutions based on gender equality—empowering both genders and eliminating the privilege/power of one gender over another."<sup>107</sup> Abrams employed a dominance perspective in evaluating Joan Williams's proposals for resolving the dilemmas of work-family conflict.<sup>108</sup> While agreeing with Williams's concept of an ensconced "domesticity" in most workplaces, as a "system in which institutions reflect and perpetuate popular attitudes toward market and family work,"<sup>109</sup> Abrams concluded that Williams's strategies did not go sufficiently far in destabilizing that hierarchy.<sup>110</sup> According to Abrams,

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104. See MACKINNON, *On Exceptionality: Women as Women in Law*, *supra* note 43, at 74. ("Being a lawyer is also substantially more consistent with the content of the male role, with what men are taught to be in this society: ambitious, upwardly striving, capable of hostility, aggressive not just assertive, not particularly receptive or set off from the track of an argument by what someone else might be saying, or God forbid, feeling . . . . The lawyer role has as its implicit norms the same qualities that are the explicit norms of masculinity as it is socially defined. It is a power role.").

105. Bender, *supra* note 38, at 949.

106. *See id.* at 945.

107. *Id.* at 949.

108. *See generally* Abrams, *supra* note 101. In explaining Williams's proposals, Abrams reports that Williams advocates a restructuring of the workplace to accommodate employees with important parenting responsibilities and adopting a strategy of "domesticity in drag," which involves pluralizing employers' and parents' options for effectively managing market and family work but fails to directly challenge the choices that currently exist. *See id.* at 753. Williams specifically emphasizes the need for "family-friendly" policies including childbirth leave, part-time work, telecommuting, job sharing, flex-time, compressed workweeks, and employer support for child and elder care. *See WILLIAMS, UNBENDING GENDER*, *supra* note 74, at 84-86.

109. Abrams, *supra* note 101, at 746.

110. Abrams proclaims that "Williams succeeds in demonstrating that domesticity presents a complex and profoundly entrenched problem." *Id.* at 751. While Abrams has no difficulty believing that basing an "ideal worker" prototype on male patterns of employment and access to a flow of household services discriminates against women, she ultimately concludes that "William's proposals . . . are unlikely to go far enough to destabilize domesticity." *Id.* at 754.

Williams's failure to challenge the male norms of productivity, masculinity, and the ideal worker, as well as the conceptual framework that enforces them, foreclosed the potential of her strategy to effect any palpable or meaningful change.<sup>111</sup>

Dominance theory has proven to be controversial in describing women's conditions. Feminists have questioned the implications of MacKinnon's dominance-based depictions of women as "victims" of male coercion, rather than autonomous agents.<sup>112</sup> Some feminists have even decried the portrayal of women as subordinated, as fostering a negative characterization of female sexuality and "wounded passivity on the part of women."<sup>113</sup> Dominance theory has also been challenged by anti-essentialists, who postulate that it portrays a unitary view of feminism and fails to consider the differences among women.<sup>114</sup> It specifically argues that the movement has as its image a white woman's face and fails to credit women of color as equally oppressed.<sup>115</sup>

MacKinnon's response to these critiques demonstrates the attractiveness of her theory for explaining the current state of inequality in law firms. Dominance feminism articulates the unrecognized pervasiveness of male domination in many facets of women's lives.<sup>116</sup> It treats women not as uniform or homogeneous, but as interrelated in their common experiences of inequality and powerlessness.<sup>117</sup> According to MacKinnon, feminism in theory is based on women's shared suffering; in practice, it aspires to eradicate the validation of women's subjugation in every culture, society, and institution.<sup>118</sup> MacKinnon focuses on group experiences because understanding the individual suffering of women in this regard "doesn't improve one's ability to analyze hierarchy as

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111. *See id.* at 771-72.

112. *See generally* Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) (outlining the sex radicals' critique of dominance feminism that emerged in the "sex wars" of the 1980s).

113. *Id.* at 305, 305-12 (discussing the writings of Camille Paglia, Katie Roiphe, Naomi Wolf, and Amber Hollibaugh). *See generally* CAMILLE PAGLIA, *SEX, ART AND AMERICAN CULTURE: ESSAYS* (1992); KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* (1993); NAOMI WOLF, *FIRE WITH FIRE: THE NEW FEMALE POWER AND HOW IT WILL CHANGE THE 21ST CENTURY* (1993).

114. *See, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Martha R. Mahoney, *Whiteness and Women, in Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217 (1993).

115. One example is Harris, *supra* note 114, at 591-92. Multiculturalists and postmodernists make this same argument that women cannot be surmised in the singular, only in the plural. *Id.*

116. *See* Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 688-89 (2000).

117. *See id.* at 697.

118. *See id.*

socially constructed.”<sup>119</sup> MacKinnon’s dominance feminism capitalizes on the relation of theory to reality. It embraces the stories of real women’s lives. It empathizes with their unique injuries, it makes their reality directly accessible, and this process is empowering. MacKinnon provides women with a platform up from dominance and stigmatized inferiority to equality. It is the denial of this equality that is most problematic and what MacKinnon offers is its realization.

Recognizing the male-dominated gender hierarchy within large law firms is the first step toward awakening any impetus for reform. MacKinnon seems to imply that once the structure of male dominance becomes known, both women and men will refuse to participate in it.<sup>120</sup> However, nonparticipation is not the only avenue for effectuating women’s advancement within these institutions. Alternative mechanisms for confronting and transforming the status quo exist and may be more pragmatic, including the building of intra-firm coalitions dedicated to eradicating both individual and institutional biases against women and promoting equality. A successful law firm is a well-integrated law firm. The most crucial element in ensuring equal opportunity for women in law firms is a commitment to the principle of equality itself. Lawyers in positions of influence must incorporate diversity into their everyday practice and must be cognizant of its importance when evaluating attorneys for promotion. They must hold themselves personally accountable not only for identifying and accepting the underlying causes of women’s underrepresentation in the partnership ranks, but also for implementing real change with regard to the current system. They must be willing to question and scrutinize the process by which they succeeded and refuse to accept psychologically convenient explanations for the problem, such as a lack of necessary qualifications or commitment. It should not be up to women to change. Rather, it is the responsibility of law firms, as organizations purporting to uphold justice, to turn a critical eye onto their own practices, and the propensity to exclude women from positions of power, and to reevaluate the philosophy underlying the current hierarchy.

Women lawyers must establish their own power base within firms. They must unite behind their shared experiences of inequality toward a common goal of gaining access to partnership. Women have an important role to play in the future of the legal profession and their experiences must not continue to be underestimated and undervalued by

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119. *Id.* at 698.

120. One scholar describes this as “MacKinnon’s theory of social change through nonparticipation.” Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 782 (1989).

large firms concerned only with billable hours and bottom lines. MacKinnon's theory seeks to undermine and deconstruct the use of such facades to justify men's power and women's subordination.<sup>121</sup> It offers a method for addressing gender disparities within law firms without invoking biological difference or notations of absolute equality. As opposed to difference and sameness feminism, dominance starts with the premise that women ought not to be treated as inferior simply because they are women. It begins with the fundamental precept that women are capable of formulating their own personal and professional destinies.<sup>122</sup> Thus, the model for change is not MacKinnon's anti-subordination theory *per se*, but the principle of equality it espouses, which empowers women to succeed on their own terms, and does not defer to them on the ground that they are different from, or similar to men.

#### V. DISCRIMINATION "BASED ON SEX" AS A CAUSE OF ACTION: WHAT ABOUT SEXUAL HARASSMENT?

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . or to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .<sup>123</sup>

Title VII of the Civil Rights Act of 1964 not only provides female attorneys with a cause of action in cases of clear physical or verbal sexual abuse, but may also serve as grounds for challenging sex discrimination with respect to the conferral of partnership in large law firms.<sup>124</sup> The issue of sexual harassment, whether defined as "quid pro quo" or "hostile working environment,"<sup>125</sup> is by no means new to the

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121. See generally Bartlett, *Gender Law*, *supra* note 34, at 6-10 (noting that MacKinnon's anti-subordination model apprehends gender-based differences as social constructs, man-made to justify the subordination of women by men). MacKinnon contends that questions of gender difference are really questions of power, specifically of male supremacy and female subordination. See *supra* note 41 and accompanying text.

122. See generally MACKINNON, *Law in the Everyday Life of Women*, *supra* note 44 (implying that women are silent in determining the opportunities available to them, and that only if given equal power to speak, will they be able to say what truly matters to them).

123. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2000).

124. The Supreme Court, in *Hishon v. King & Spalding*, held that Title VII enabled a female associate to establish a claim of sex discrimination on the basis of the partnership selection process. 467 U.S. 69, 77 (1984).

125. MacKinnon is responsible for the bifurcation of actionable conduct under Title VII into

legal profession or law firms.<sup>126</sup> Sexual harassment and other types of sex discrimination occur with “marked frequency” in law firms,<sup>127</sup> and act as a major impediment to women lawyers’ mobility.<sup>128</sup> While overt sexual overtures are rarely cited, more subtle forms of harassment, such as vulgar humor and sexually suggestive speech, are commonly employed as a way of reinforcing gender hierarchies within firms.<sup>129</sup> The sexual harassment of female attorneys, including “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,”<sup>130</sup> is actionable conduct.<sup>131</sup> However, for several reasons, such behavior is not prosecuted or punished to the extent necessary to effectuate palpable change.<sup>132</sup> The denial of partnership solely on the basis of gender stereotyping, bottom-line concerns, and myths of choice may also constitute a form of sex discrimination actionable under Title VII.

In adopting a dominance approach to remedying the hierarchal structure of large law firms, the ability of female attorneys to translate their experiences of sex inequality into a cognizable injury is of paramount importance. An examination of the various case law interpreting Title VII, and the jurisprudence underlying its enactment, suggests that female lawyers are protected from intra-firm sexual

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two distinct categories: (i) quid pro quo, where a supervisor threatens harm or promises benefits in exchange for sexual compliance; and (ii) hostile work environment, where the harasser’s conduct has the effect of interfering with work performance or creates an intimidating or offensive working condition. See CATHARINE A. MACKINNON, *Sexual Harassment: Its First Decade in Court, in FEMINISM UNMODIFIED*, *supra* note 20, at 103, 109-10. This distinction was later adopted by the Court; see *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 62 (1986); see also EEOC’s Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2004) (setting out these two types of sexual harassment claims).

126. See generally S. Elizabeth Foster, *The Glass Ceiling in the Legal Profession: Why Do Law Firms Still Have So Few Female Partners*, 42 U.C.L.A. L. REV. 1631, 1634-36 (1995) (stating that despite the progress that has been made in the past two decades, sexual harassment and sex discrimination in the legal profession persist and may be more widespread than in other elite professions).

127. Audrey Wolfson Latourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 VAL. U. L. REV. 859, 890 (2005) (“Indeed, studies demonstrate that more than fifty percent of female attorneys experience sexual harassment.”).

128. See *id.* at 893 (“Unquestionably, sexual harassment and sex discrimination, which employ gender stereotypes and regard women as a group rather than as individuals, ‘provide serious obstacles to mobility’ and hence contribute to the glass ceilings.”) (citation omitted). See also Epstein et al., *supra* note 6, at 303 (“[Both] sexual harassment and sex discrimination [in law firms] contribute to glass ceilings.”).

129. See Epstein et al., *supra* 6, at 303-04, 372 (stating that the use of joking may cover up a particularly subversive form of subordinating women).

130. 29 C.F.R. § 1604.11(a).

131. See *id.*

132. See *infra* notes 147-58 and accompanying text (explaining why women lawyers who experience sexual harassment fail to come forward).

harassment and sex discrimination in the conferral of advancement opportunities.<sup>133</sup> However, the application of Title VII to the intricacies of law firm life demonstrates that the relevant legal concepts may fall short of representing women lawyers' true injuries in seeking partnership. The remainder of this Part briefly addresses two principal concerns emanating from the applicability of Title VII to women's experiences in large law firms: the impact of non-prosecuted, pervasive sexual harassment on the ability of female associates to advance within law firms, and the use of disparate impact theory to craft a cause of action against discriminatory practices in awarding partnership.

*A. Taking Sexual Harassment Seriously: Recognizing Wrongs to Female Attorneys*

Perhaps the most important lesson is that the mountain can be moved. When we started, there was absolutely no judicial precedent for allowing a sex discrimination suit for sexual harassment. Sometimes even the law does something for the first time.<sup>134</sup>

The legal claim for sexual harassment is distinctly feminist in origin and is largely attributable to the work of MacKinnon.<sup>135</sup> In fashioning a cause of action, feminists sought to provide redress for the unique harms inflicted upon women in the workplace.<sup>136</sup> They sought to have the law "recognize wrongs to women as wrong."<sup>137</sup> MacKinnon describes the codification of the law against sexual harassment as feminism's greatest

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133. According to the Supreme Court's decision in *Hishon v. King & Spalding*, law firm associates may be considered employees and are therefore entitled to invoke employment discrimination laws, including Title VII. See 467 U.S. 69, 73-74 (1984) (reasoning that the partnership itself may be an employer for purposes of Title VII and that Hishon, an associate, was an employee; note that the court did not actually reach the merits of Hishon's claim and only focused on the applicability of Title VII to partnership evaluations). It is a more complicated issue, however, to determine whether those laws protect law firm partners. In his concurrence, Justice Powell wrote that Title VII does not protect partners in law firms because their relationship to the firm "differs markedly from that between employer and employee." *Id.* at 79 (Powell J., concurring).

134. MACKINNON, *Sexual Harassment: Its First Decade in Court*, *supra* note 125, at 103, 116.

135. See Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37, 37-39 (1993) (identifying MacKinnon's book, *SEXUAL HARASSMENT OF WORKING WOMEN*, published in 1979, as one of, if not the, most influential texts on the topic).

136. See *id.* at 38; see also MACKINNON, *Sexual Harassment: Its First Decade in Court*, *supra* note 125, at 106 (describing sexual harassment as an injury special to women in that it is overwhelmingly men who harass women); UNFINISHED AGENDA, *supra* note 4, at 19 (reporting that ninety percent of sexual harassment complaints are filed by females).

137. MACKINNON, *Sexual Harassment: Its First Decade in Court*, *supra* note 125, at 104 (developing a legal claim for sexual harassment was about "getting the law to recognize wrongs to women as wrong").

achievement,<sup>138</sup> and as the first time in history that women were permitted to translate their injuries into legal doctrine.<sup>139</sup> MacKinnon praises the law of sexual harassment for giving a voice to women's once silent suffering, providing an analysis of sexual violation sufficiently connected to gender, and allowing for the formation of an etiology.<sup>140</sup> MacKinnon suggests that the recognition of sexual harassment as a cognizable legal claim represented a necessary first step to reforming and remedying pervasive gender hierarchies in society.<sup>141</sup>

The application of sexual harassment law to some of society's most chauvinistic institutions, including law firms, has yet to produce many of the meaningful reforms initially promised.<sup>142</sup> Power arrangements dominated by men, particularly in the professional context, remain fertile breeding ground for the sexually motivated stigmatization and victimization of women.<sup>143</sup> It is not surprising, therefore, that incidences of sexual harassment are commonplace in many large law firms. Indeed, more than half of all women attorneys report experiencing sexual harassment.<sup>144</sup> However, it is impossible to determine the extent to which such actions are legally reprehensible based on this data, as the vast majority of sexual harassment in law firms goes unreported due to individual, as well as institutional, failures to confront the issue.<sup>145</sup> Nonetheless, it is evident that some clearly impermissible behavior continues to occur, including sexual propositioning, groping, and verbal

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138. The development of the law against sexual harassment is likewise hailed as MacKinnon's "greatest success." Thomas Nagel, *Legal Violations*, TIMES LITERARY SUPP., May 20, 2005, at 8 (reviewing CATHARINE A. MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* (2005)), available at <http://tls.timesonline.co.uk/article/0,,25351-1887054,00.html>.

139. MacKinnon contrasts the law of sexual harassment, invented and structured by feminists, to that of rape, defined based on what men considered the violation to be. See MACKINNON, *Sexual Harassment: Its First Decade in Court*, *supra* note 125, at 105.

140. See *id.* at 103-04.

141. See *id.* at 104 (positing that providing women with a cause of action against sexually discriminatory conduct, or a platform up from dominance and stigmatized inferiority, is the best way to remedy the harms of institutionalized subordination and gender hierarchy). Just as MacKinnon found the inception of a legal claim against sexual harassment essential to the social advancement of women, the extension of that claim to more subtle and pervasive forms of sex discrimination in employment is necessary to remedy their professional subordination.

142. See generally Miriam A. Cherry, *How to Succeed in Business Without Really Trying (Cases): Gender Stereotypes and Sexual Harassment Since the Passage of Title VII*, 22 HOFSTRA LAB. & EMP. L.J. 533, 547-48 (2005) ("Title VII has not been the panacea for women in the labor force that many hoped it would be.").

143. See MACKINNON, *Sexual Harassment: Its First Decade in Court*, *supra* note 125, at 107-09.

144. Latourette, *supra* note 127, at 890; see also UNFINISHED AGENDA, *supra* note 4, at 19 (reporting that almost three-quarters of female lawyers believe that harassment is a problem in their workplaces).

145. See UNFINISHED AGENDA, *supra* note 4, at 19-20.

abuse.<sup>146</sup>

While law firms may be held vicariously liable for the harassing and sexually inappropriate conduct of partners,<sup>147</sup> litigation under Title VII is obviously viewed as a last resort by female associates who experience sexual harassment.<sup>148</sup> As a result, law firms have been entrusted with the primary responsibility of establishing procedures intended to ferret out and punish inappropriate sexual aggressions. The protections afforded to victims of sexual harassment under Title VII represent only a minimum of what law firms must provide. Firms should not discount the possibility that subtle forms of behavior, including otherwise seemingly innocuous humor, may be used as a tool of subordination and are, therefore, tantamount to sexual harassment. The failure of many firms to confront and remedy even some of the most basic forms of sexual harassment, and the personal views of some male lawyers in underestimating and speculating as to its occurrence, contributes to the subordination women lawyers.

The Equal Employment Opportunity Commission ("EEOC") promulgates federal guidelines prohibiting unwanted sexual advances and conduct leading to a hostile work environment. Virtually all law firms have instituted sexual harassment policies based on EEOC guidelines,<sup>149</sup> yet a formidable gap remains between formal firm policy and actual practice.<sup>150</sup> Sexual harassment persists in many law firms, at least in part, due to a lack of consensus regarding what actually constitutes inappropriate behavior, with the exception of unwanted physical contact.<sup>151</sup> Whatever the differences in interpretation among

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146. *See id.* at 20.

147. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 802 (1988) (holding that employers may be subject to vicarious liability for the creation of unlawfully hostile work environments by supervisors); *see also Latourette*, *supra* note 127, at 891 (citing *Faragher* as standing for the proposition that law firms may prove vicariously liable for an individual partner's sexual harassment of an associate, but that Title VII has not yet been extended so as to include partner-on-partner harassment).

148. This is demonstrated by the relatively low number of sexual harassment complaints formally filed, especially in comparison to its reported occurrence. *See supra* note 147; *infra* notes 149-58 and accompanying text. *See Jay Marhoefer*, Note, *The Quality of Mercy Is Strained: How the Procedures of Sexual Harassment Litigation Against Law Firms Frustrate Both the Substantive Law of Title VII and the Integration of an Ethic of Care into the Legal Profession*, 78 CHI.-KENT. L. REV. 817, 834 (2003) (concluding that "the act of filing a formal complaint and commencing litigation is viewed by victims as a last resort, one to be pursued only after attempts to procure an in-house remedy have been exhausted").

149. *See UNFINISHED AGENDA*, *supra* note 4, at 19.

150. *See id.*; *see also Marhoefer*, *supra* note 148, at 833.

151. *See Epstein et al.*, *supra* note 6, at 371-72.

Because women today expect equality, they have low tolerance for sexist behavior, particularly disrespectful comments and jokes, and no tolerance for sexual harassment. Because of the subtle form of this behavior and the fuzzy boundaries between

women lawyers, research reveals that male attorneys delineate a narrower spectrum of activity as constituting sexual harassment and, thus, are less able to differentiate between friendly and sexually tinged conduct.<sup>152</sup> While these perceptions may be consistent with the self-interest of each group,<sup>153</sup> sexual harassment jurisprudence should continue to reflect the violation as its victims perceive it and embrace the broader of the two understandings.<sup>154</sup>

Sexual harassment affects various facets of a female lawyer's professional and personal life, including the ability to advance, the level of job satisfaction, and psychological condition.<sup>155</sup> The moment a woman physically memorializes her complaint, questions concerning her integrity and credibility arise.<sup>156</sup> For these reasons, in addition to the fear of being discredited or retaliated against, most instances of sexual harassment in law firms are never officially brought to light or

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friendliness, joking, hostility, and discrimination—as well as of the generational differences in interpretations of harmful intent—there are considerable problems in identifying specific sources of sexual discrimination and sexual harassment.

*Id.*

152. *See id.* at 372 (alluding to the fact that many male lawyers have learned to relate to women based only on sexual differentiation and, thus, often use innuendo as a way of controlling women or reinforcing their sense of “otherness”).

153. *See id.* at 371-72 (noting that the term “sexual harassment” may implicate a wide range of conduct, and that a majority of women claim to have experienced minor improprieties as well as more serious forms of harassment); *see also* Barbara Gutek, *Understanding Sexual Harassment at Work*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335, 342-43 (1992) (explaining that women, in general, define sexual harassment more broadly than men, and the differing views among the sexes as to what constitutes harassment comports with each groups respective self-interest).

154. MacKinnon hails the legal claim for sexual harassment as designed by women to fit the wrong as it happens to women. *See* MACKINNON, *Sexual Harassment: Its First Decade in Court*, *supra* note 125, at 105. If the law is to live up to this legacy, however, its definition of sexual harassment must remain consistent with women's experiences of violation and sex discrimination. *See* Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 48 (1990) (suggesting that the interpretation and application of Title VII relies too heavily on the good faith of the courts and, as a result, it appears that while women may have named sexual harassment, they have “lost control of the content of its definition”).

155. For statistical evidence of the impact of sexual harassment on the careers of women lawyers, *see generally* David N. Laband & Bernard F. Lentz, *The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers*, 51 INDUS. & LAB. REL. REV. 594 (1998).

156. *See* MACKINNON, *Sexual Harassment: Its First Decade in Court*, *supra* note 125, at 110-11 (explaining that women who experience sexual harassment have nothing but their word, and while this makes their professional and sexual credibility highly susceptible to attack, they should not also have to bear having their personal account of abuse reduced to fictional fantasy). Feminists have also argued that courts may treat sexual harassment victims with undue skepticism. *See* Pollack, *supra* note 154, at 56-57 (explaining that the totality of the circumstances standard applied by the courts allows the focus of the inquiry to be shifted from the offender's actions to those of the victim's, and thereby “legitim[izes] sexual harassment by offering the offender an excuse for his behavior”).

litigated.<sup>157</sup> The complaint procedures in place at most firms serve only to further deter women from coming forward by failing to afford complainants adequate protection and job security.<sup>158</sup> Unfortunately, those currently in positions of power at large law firms appear less concerned with identifying, sanctioning, and eradicating sexual harassment than with the potential for unwarranted accusations.<sup>159</sup> As noted earlier, apprehension over the filing of erroneous claims causes many male attorneys to forgo mentoring and socializing with younger female lawyers.<sup>160</sup> Even if the adoption of a broad—and potentially over-inclusive—policy against sexual harassment would result in some false accusations, this does not justify the failure of firms to take seriously any of the harms of sex subordination, segregation, and stereotyping.<sup>161</sup>

The highly questionable responses of the industry and many male attorneys to the sexual harassment problem within most firms may account for its continued pervasiveness and only further dissuade female attorneys from coming forward. The law of sexual harassment may have given women's suffering a name in the public sphere, but a veil of secrecy and silence still shrouds the private sexual harassment of women lawyers in large law firms, where sexist attitudes are still permissible and legitimized, and where wrongs to women are recognized as wrong, but are not perverse enough to warrant corrective action.

### *B. Sex Discrimination in Promotion: Disparate Impact as a Sword*

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary,

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157. See UNFINISHED AGENDA, *supra* note 4, at 20 (discussing “surveys from a wide variety of occupational contexts” which reveal that very few women subjected to sexual harassment (typically under ten percent) register any formal complaint and more often fail to come forward for fear of retaliation, ridicule, or informal backlash).

158. See *id.* at 35-36 (identifying strategies to help firms establish formal complaint processes which make it safe for victims of sexual harassment to come forward).

159. See, e.g., *id.* at 20 (“Yet while the likelihood of complaints is small for all but the most serious behavior, concerns about unjust accusations are considerably higher.”).

160. See *supra* note 86 and accompanying text. See UNFINISHED AGENDA, *supra* note 4, at 20; Epstein et al., *supra* note 6, at 378 (arguing that focusing on women's sex status may preclude female associates from establishing the relationships necessary for career mobility); cf. Rhode, *Myths of Meritocracy*, *supra* note 11, at 589-90 (pointing out that “men who now invoke harassment as a reason to avoid mentoring women colleagues found ample other reasons to avoid it in the past”).

161. Far from having their claims taken seriously, women lawyers who report instances of sexual harassment may be subjected to ridicule and regarded as overly sensitive. See Epstein et al., *supra* note 6, at 372-73.

Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.<sup>162</sup>

In seeking entry into large law firms, female attorneys successfully wielded Title VII as a weapon against discriminatory hiring practices.<sup>163</sup> Yet, Title VII surely proscribes more than just equal opportunity with respect to getting in the door; it must also mean equality with regard to promotion. A growing body of gender bias litigation under Title VII concerns the right of female associates to be afforded equal treatment in attaining partnership and its concomitant benefits.<sup>164</sup> Established precedent suggests that Title VII's protections extend to the law firm partnership selection processes.<sup>165</sup> Less settled, however, are the issues that arise involving the level of proof female associates claiming discrimination in promotion are required to satisfy. As interpreted by the Supreme Court, in *Griggs v. Duke Power Co.*, a plaintiff may recover if she is able to show either that her law firm treated her differently because of her sex or that an unjustified firm policy had a disparate impact upon women attorneys.<sup>166</sup>

Joan Williams contends that the design of the prototypical executive promotion track often yields a disparate impact on women employees and may vest within them a colorable claim against their employers for discrimination on the basis of sex.<sup>167</sup> Williams explains that the outcome of a disparate impact suit depends upon a three-step burden shifting mechanism: first, the plaintiff must show that a facially

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162. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (invalidating an employer's high school completion requirement and general intelligence test, which operated to exclude African-Americans, where it "[did not] not bear a demonstrable relationship to successful performance of the jobs," was adopted "without meaningful study," and where employees hired prior to the requirements, "who [had] not completed high school . . . [performed] satisfactorily").

163. See Latourette, *supra* note 127, at 884-85 (citing *Kohn v. Royall, Koegel & Wells*, 59 F.R.D. 515 (S.D.N.Y. 1973); see also *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975)) (explaining that the most pressing concern in large national law firms is no longer hiring, but rather the conditions of employment and promotion in particular).

164. See Latourette, *supra* note 127, at 889.

165. See *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (holding that law firm partnership decisions are within the purview of Title VII); see also *supra* note 133 and accompanying text.

166. *Griggs*, 401 U.S. 424. See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 911 (1997) (noting that this interpretation of the proof required in a Title VII disparate impact suit allows for greater recovery than constitutional sex discrimination cases, where "plaintiffs alleging that a state employment practice has a disparate impact upon them must also show that the disparate impact was intended").

167. See Williams, *supra* note 9, at 328-33 (giving an overview of the various facets of suits challenging masculine ideal work norms under Title VII disparate impact theory).

neutral employment practice has a disparate impact on women; second, if the plaintiff proves disparate impact, the onus shifts to the employer to offer evidence that the policy is justified by business necessity; and, finally, if the employer successfully carries this obligation, the plaintiff may still prevail on the merits by showing the availability of a less discriminatory alternative (“LDA”).<sup>168</sup> Female lawyers challenging law firm partnership policies can easily meet the initial burden of proof; a prima facie disparate impact case may be made by offering evidence comparing the vastly disproportionate sex composition of entry-level associates with that of partners,<sup>169</sup> and by arguing that the paucity of women partners is caused by various firm practices—such as those discussed in the sections above—and not a lack of interest.<sup>170</sup> As Williams points out, one common law firm practice known to produce a disparate impact is taking part-time workers off the partnership track.<sup>171</sup> Even if the alleged impact is produced by a series of integrated firm policies which cannot necessarily be separated out, the plaintiff may still satisfy her burden by showing that the “bottom-line” results are discriminatory.<sup>172</sup>

While there may be ample evidence available to plaintiffs linking the design of the partnership track to a disparate impact on female attorneys, overcoming the business necessity defense or proving the existence of an LDA may be significantly more complex and difficult. The standard for business necessity remains somewhat unclear. The Civil Rights Act of 1991, which codifies the analysis enunciated by the Supreme Court in *Griggs* and its progeny, requires that the discriminatory practice be “job related” and essential to the business.<sup>173</sup>

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168. *See id.* at 329.

169. *See Latourette, supra* note 127, at 895 (noting the fact that women are overrepresented among associates while severely underrepresented as partners, and “[w]hile some of the disparity is attributable to individual preferences, constraints continue to affect women’s professional career opportunities”).

170. A plaintiff establishes a prima facie case by (i) offering statistical proof of disparate impact, (ii) showing that this is not the result of women’s own choices, and (iii) delineating the policies most at issue. The burden of proof then shifts to the defendant, who is given the opportunity to argue that the policy in question is a business necessity. *See Williams, supra* note 9, at 331.

171. *See id.*

172. *See id.* (construing 42 U.S.C. § 2000e-2(k)(1) (1999)).

173. *See* Civil Rights Act of 1991, 42 U.S.C. § 2000e-16a (1999); *see Williams, supra* note 9, at 331-34 & n.164. Williams documents the complexity of the law on business necessity, starting with the Supreme Court’s decision in *Wards Cove Packing Co. v. Atonio*, which held that the employer only has to articulate a reasonable “justification for his use of the challenged practice,” 490 U.S. 642, 752 (1989), to Congress’s overturning of *Wards Cove* with the passage of the Civil Rights Act of 1991, “[codifying] the concepts of ‘business necessity’ and ‘job related’ enunciated by the Supreme Court in *Griggs v. Duke Power Co.* and other decisions prior to *Wards Cove.*” Williams, *supra* note 9, at 332 n.164.

Assuming that this is the test, many current law firm practices may not be considered business necessity, including the use of male norms in constructing the traits and schedule necessary for partnership.<sup>174</sup> Defendant law firms may legitimately contend that promoting only those associates who work long hours ensures maximum profitability. However, the issue is not whether employers may permissibly engage in cost-containment efforts, but the extent to which they are permitted to structure those measures in such a way as to systematically disadvantage women employees.<sup>175</sup> Sometimes business necessity may, in fact, justify requiring certain gendered characteristics, but courts must consider whether such requirements are narrowly job related and truly consistent with business necessity.<sup>176</sup> Even if the firm is successful in defending its promotion practices, a plaintiff may still prevail by showing that an alternative, less discriminatory way of structuring the partnership track is feasible and available to the defendant firm.<sup>177</sup>

A number of Supreme Court and other judicial interpretations of Title VII continue to directly influence the struggle to eradicate sex discrimination in modern law firms. Unfortunately, as Nancy Farrer observes, “[these] decisions nonetheless suggest a reluctance to lead the tide of social change.”<sup>178</sup> Perhaps one of the greatest legal setbacks for women attorneys seeking equality in advancement was the Third Circuit’s opinion in *Ezold v. Wolf*.<sup>179</sup> In that case, the plaintiff sued her law firm under Title VII after it denied her partnership, alleging that its claim that she lacked the requisite analytical ability for promotion was merely a pretext for gender discrimination.<sup>180</sup> The most troubling aspect of the court’s reasoning, however, was the deference it granted the firm’s decision-making process.<sup>181</sup> Legal scholars and commentators have criticized *Ezold* as “overly deferential to an employer’s subjective standard[s] for advancement,” which are more easily influenced and

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174. See Williams, *supra* note 9, at 332.

175. See *id.* at 333.

176. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 53 (1995) (discussing the impact of the Supreme Court’s opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), on the future of gender discrimination law under Title VII).

177. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) (stating that the plaintiff bears the burden of establishing the existence of a less discriminatory alternative).

178. Nancy L. Farrer, *Of Ivory Columns and Glass Ceilings: The Impact of the Supreme Court of the United States on the Practice of Women Attorneys in Law Firms*, 28 ST. MARY’S L.J. 529, 531 (1997).

179. 983 F.2d 509 (3d Cir. 1992), *cert denied*, 510 U.S. 826 (1993).

180. See *id.* at 513.

181. See *id.* at 527 (cautioning courts against “unwarranted invasion or intrusion” into “professional judgments about an employee’s qualifications for promotion within a profession”).

swayed by unconscious bias.<sup>182</sup> The Supreme Court's landmark ruling in *Price Waterhouse v. Hopkins*,<sup>183</sup> on the other hand, is positive precedent for female attorneys pursuing disparate impact allegations against law firms. In *Hopkins*, the Court held that advising a female candidate for an accounting partnership that she should dress and act more feminine constituted impermissible sex stereotyping.<sup>184</sup> It read Title VII strictly as stating that "gender must be irrelevant to employment decisions"<sup>185</sup> and "an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision."<sup>186</sup> As the first mixed-motive case considered by the Court, *Hopkins* represents a logical extension of Title VII principles to cases in which gender may be only one of several factors influencing promotion decisions.<sup>187</sup> *Hopkins* presents a disparate impact analysis that reexamines gendered traits useful for job performance and inquires whether certain criteria favor males so as to produce a discriminatory result.<sup>188</sup>

## VI. CONCLUSION

Law firms operate against the backdrop of a profession currently mired in its own battle against claims of a lack of diversity. One can

hardly expect things to change overnight with respect to the introduction of minorities and women in the profession. However, the situation may be worse than most people envision. While legal institutions pay lip service to law students, the public, and even each other about the vigor with which they are willing to promote new blood, those at the top

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182. Farrer, *supra* note 178, at 568; *see also* Latourette, *supra* note 127, at 889 (noting that "*Ezold* and its progeny have not served as absolute deterrents to potential plaintiffs").

183. 490 U.S. 228 (1989).

184. *See id.* at 251.

185. *Id.* at 240.

186. *Id.* at 242.

187. *See* Farrer, *supra* note 178, at 564.

188. *See* Case, *supra* note 176, at 31-32. It is also significant because it demonstrates that "having to be the same as men to be treated equally remains the standard"). Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1292 (1991). "Hopkins was made partner . . . for meeting the male standard, a victory against holding her to a 'femininity' standard. . . . The victory lies in the recognition of women's merits when they meet the male standard. The limits lie in the failure to recognize that the standard is a male one." *Id.* at 1292 n.50.

continue to be white males. This is a fact easily proven by opening any reputable publication which advertises and discusses top law firms alongside the names and pictures of their best attorneys. This Note began with that exact type of empirical study. All one needs to do is peruse the *Area's Best Lawyer* issue of New York Magazine to notice that all of the attorneys' faces look the same. As a law student, I wonder what it would take and what it would mean to have a profession of many different faces, statures, sizes, and colors.

What would it take? It takes more than just recognizing the dominance of male norms and concomitant subordination of feminine characteristics to reforming intra-firm gender hierarchies. It takes an entire profession to make a difference in the quality of life provided to those that have committed themselves to its very cause amid fears of never reaching the apex simply because of gender. It takes a community of lawyers to question whether the practices and policies currently in place at most legal institutions ensure more than immediate monetary gain, such as quality of representation. It takes a certain kind of person to stand up against sex discrimination and sue her employer under Title VII for failing to offer the same advancement opportunities to individuals similarly situated in every respect but their group membership. It takes a special kind of judge and jury to believe in that person's right to equal treatment despite skepticism being cast upon her credentials, intelligence, capacity, and qualifications. It takes a woman more courageous than I to jeopardize her career, monetary, psychological, and emotional stability in order to promote the professionalism of others. It takes an insightful society to realize that women no longer dream in terms of what they can achieve despite being women, but now aspire to be as great and successful as any person, man or woman. And it takes an unprecedented and reformulated interpretation of the law to rectify the wrongs imposed upon women in a

profession that defines success so narrowly as to exclude them from these very dreams.<sup>189</sup>

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189.

Does life make law or does law make life? [T]hey wonder. When men make both, and you are a woman, the distinction may not count for much, except that law purports to have rules other than force and pretends to be accountable, whereas life does not. At this

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point, the case for giving up on law is even stronger than the case for giving up on life.

Women giving up does not seem to be the point.

MACKINNON, *Law in the Everyday Life of Women*, *supra* note 44, at 41-42.

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